Supreme Court, U.S.
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No. 89-664

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, AIRLINE DIVISION, AND TEAMSTERS LOCAL 19,
Petitioners,

v.

SOUTHWEST AIRLINES CO.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

In deciding that the parties' collective bargaining agreement *arguably* authorized the employer to implement unilaterally a drug testing program, did the court of appeals render a decision in conflict with applicable decisions of this Court?

II.

In deciding that the parties' collective bargaining agreement *arguably* authorized the employer to implement unilaterally a drug testing program, did the court of appeals render a decision in conflict with a decision of another federal court of appeals on the same matter?

RULE 28.1 LISTING

Southwest Airlines Co. has no parent or affiliate companies. The only subsidiary is wholly owned.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 28.1 LISTING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
REASONS FOR DENYING THE WRIT	5
CONCLUSION	14
APPENDIX A	1a

TABLE OF AUTHORITIES

Case	Page
Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 8 L. Ed. 2d 462, 82 S. Ct. 1318 (1962)	8
Brotherhood of Locomotive Engineers v. Burlington Northern R.R. Co., 838 F.2d 1087 (9th Cir. 1988), *vacated* at 106 L. Ed. 2d 558 (1989)	10,12
Brotherhood of Locomotive Engineers v. Burlington Northern R.R. Co., 838 F.2d 1102 (9th Cir. 1988)	10,12,13
Brotherhood of Locomotive Engineers v. Louisville & National R.R., 373 U.S. 33, 10 L. Ed. 2d 172, 83 S. Ct. 1059 (1963)	8
Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R. Co., 802 F.2d 1016 (8th Cir. 1986)	10,13
Chicago & Northwestern Ry. Co. v. United Transp. Union, 402 U.S. 570, 29 L. Ed. 2d 187, 91 S. Ct. 1731 (1971)	9
Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. ___, 105 L. Ed. 2d 250, 109 S. Ct. 2477 (1989)	*passim*
H.K. Porter Co., Inc. v. NLRB, 379 U.S. 99, 25 L. Ed. 2d 146, 90 S. Ct. 821 (1970)	9
Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 75 L. Ed. 2d 387, 103 S. Ct. 1467 (1983)	6,7
NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 96 L. Ed. 1027, 72 S. Ct. 824 (1952)	9
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615 (1937)	9
Order of Ry. Conductors of Am. v. Pitney, 326 U.S. 561, 90 L. Ed. 318, 66 S. Ct. 322 (1946)	8
Skinner v. Railway Labor Executives' Ass'n, 489 U.S. ___, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989)	12

Table of Authorities Continued

Page

Transport Workers Union of Philadelphia v. Southeastern Pennsylvania Transp. Auth., 863 F.2d 1110 (3d Cir. 1988), *vacated* at 106 L. Ed. 2d 560 (1989), *on remand*, 884 F.2d 709 (3d Cir. 1989) 10,11,13

United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 4 L. Ed. 2d 1403, 80 S. Ct. 1343 (1960) 8

United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960) 7

Statute

National Labor Relations Act, 29 U.S.C. § 151, *et seq.* 7,8,9

Railway Labor Act, 45 U.S.C. § 151, *et seq.* ..... *passim*

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

The essential facts are not in dispute and are set forth in the *en banc* opinion of the Fifth Circuit, reported at 875 F.2d 1129. The *en banc* opinion of the Fifth Circuit is reproduced as Appendix A of the petition for writ of certiorari. References in this brief to the *en banc* opinion of the Fifth Circuit are to the cited page numbers in Appendix A of the petition for writ of certiorari.

Respondent Southwest is a common carrier by air subject to the Railway Labor Act, 45 U.S.C. § 151, *et seq.* Petitioners Teamsters represent Southwest's mechanics and related employees. Article 2, Para-

graph 4 of the parties' collective bargaining agreement provides:

> Employees covered by this Agreement shall be governed by all Company rules, regulations, and orders previously or hereafter issued by proper authorities of the Company which are not in conflict with the terms and conditions of this Agreement, and which have been made available to the employee prior to becoming effective.

(Pet. 2a.)

Before 1986, Southwest's drug and alcohol policy consisted mainly of Rule G, a rule of many years' standing which had been unilaterally promulgated. Its provisions defined "serious, unacceptable conduct" and included the following:

> 4. Reporting for or carrying on work while showing any signs of the use of intoxicants or knowingly permitting another employee to do so is strictly prohibited.
>
> 5. Possession of or drinking of any intoxicant or illegal possession or use of illegal or dangerous drugs on Company premises or while in uniform and/or habitual use of intoxicants or use of illegal or dangerous drugs on or off duty will not be tolerated.

Rule G had no significant history of enforcement; nor did Southwest have a known problem with employee use of alcohol or drugs. Nevertheless, Southwest decided to expand its drug policy. Specifically, it decided to implement a drug and alcohol testing program. The program is comprehensive and detailed. It prohibits

detectable levels of illegal drugs, defined blood alcohol levels, and any level of medication that could impair performance, as well as any possession of illegal drugs. To enforce these prohibitions, the program mandates pre-employment urine drug screening, and urine drug screening of employees after accidents or if management has a reasonable suspicion of drug or alcohol use. The program establishes detailed testing procedures, and prescribes punishment, including discharge, for violations of the policy. (Pet. 2a-3a.)

On October 16, 1986, Southwest informed the Teamsters of its intent to implement the program. The Teamsters then sought to bargain over the terms of the program. Southwest was willing to discuss the program, but refused to negotiate its terms with the Teamsters. Other unions did participate in discussions with Southwest, and these discussions affected the shape of the program. (Pet. 3a.)

In December of 1986, the Teamsters filed this action, seeking to enjoin Southwest's unilateral implementation of the program. In January of 1987, the district court granted a preliminary injunction.[1] The district court reasoned that the implementation of the program was not arguably justified under the terms of the collective bargaining agreement and that, therefore, the dispute was "major." In the alternative, the district court held that even if the dispute were "minor", a preliminary injunction was warranted because of the likelihood of irreparable harm to employees if the program were enforced before the

[1] Contrary to the statement of Petitioners at Page 5 of their petition, Southwest did not implement the program on January 1, 1987. Rather, Southwest merely *proposed* to implement the program on that date.

Teamsters' objections to the program could be arbitrated. (Pet. 3a.)

Southwest appealed the preliminary injunction, and a panel of the Fifth Circuit affirmed. 842 F.2d 794. Southwest timely sought re-hearing *en banc*, which was granted. On re-hearing, the *en banc* court concluded that the contractual language quoted above *arguably* grants to Southwest the right unilaterally to implement the drug testing program in question. Further, the *en banc* court concluded that under the circumstances presented in this case, an injunction to maintain the status quo pending arbitration was unwarranted. Accordingly, the injunction entered by the district court was vacated.[2] (Pet. 14a.)

Summary of Argument

I.

Teamsters argue that the *en banc* opinion of the Fifth Circuit is in conflict with this Court's decision in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. ___, 105 L. Ed. 2d 250, 109 S. Ct. 2477 (1989) (hereafter "*Conrail*"). Contrary to Teamsters' argument, the *en banc* opinion of the Fifth Circuit is in conformity with this Court's decision in *Conrail*.

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[2] In Footnote 1 of their petition, Petitioners state: "There is presently pending in the Fifth Circuit a motion to affirm the district court's final dismissal in favor of Southwest." (Pet. 3.) This statement is incorrect. On September 12, 1989, a panel of the Fifth Circuit granted the motion to affirm the district court's final dismissal in favor of Southwest. A copy of the Fifth Circuit's order of September 12, 1989, is re-produced as Appendix A hereto.

In *Conrail*, this Court affirmed and adopted the test uniformly utilized by various courts of appeals in determining whether a dispute is "minor" or "major" under the Railway Labor Act. "Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major." *Id.* at 105 L. Ed. 2d 264. This is precisely the same standard utilized by the Fifth Circuit in its *en banc* opinion.

II.

Teamsters argue that the *en banc* opinion of the Fifth Circuit is in conflict with four decisions of other United States courts of appeals. As will be more fully developed below, all four decisions are factually inapposite. With only one exception, *none* deals with the issue of whether express contract language arguably justified the employer's unilateral action. Further, two of the decisions have been vacated by this Court and remanded for reconsideration. Finally, one decision is cited for a proposition directly contrary to its actual holding. Consequently, the *en banc* opinion of the Fifth Circuit is not in conflict with any of the cited decisions.

Reasons for Denying the Writ

I.

Teamsters argue that the *en banc* opinion of the Fifth Circuit is in conflict with this Court's decision in *Conrail*. Analysis of the substance of their argument, however, reveals that Teamsters are actually

requesting this Court to abandon the test enunciated in *Conrail* and adopt a different standard.

In *Conrail*, this Court adopted and affirmed the standard uniformly utilized by various courts of appeals in determining whether a dispute is major or minor under the Railway Labor Act: "Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major." *Id.* at 105 L. Ed. 2d 264.

Teamsters argue, however, that where the issue involves a management rights clause which purportedly grants to management a degree of freedom to act unilaterally within a sphere of activity, the Court should not utilize the "arguably justified" standard. Rather, Teamsters argue that the Court should then apply a stricter standard, i.e., the Court should determine whether there has been a "clear and unmistakable waiver" by the Union concerning the proposed action. This higher standard, i.e., the "clear and unmistakable waiver" standard, completely eviscerates the "arguably justified" standard enunciated by this Court in *Conrail*.

First, as this Court noted in *Conrail*, under the "arguably justified" standard, the party seeking to establish that the dispute is minor and, therefore, arbitrable, bears a "relatively light burden." *Id.* Contract waiver, on the other hand, cannot be lightly inferred. A party seeking to establish contract waiver has an onerous burden of establishing that waiver is "clear and unmistakable." ***Metropolitan Edison Co. v.***

NLRB, 460 U.S. 693, 75 L. Ed. 2d 387, 103 S. Ct. 1467 (1983). Placing such an onerous burden on a party seeking to establish the arbitrability of a dispute would be contrary to this Court's historic position of resolving any doubts in favor of arbitrability.

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 4 L. Ed. 2d 1409, 1417-18, 80 S. Ct. 1347 (1960).

Secondly, adoption of the "clear and unmistakable waiver" standard suggested by Teamsters would require this Court to become embroiled in interpretation of the parties' collective bargaining agreement. Under both the RLA and the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, this Court has steadfastly refused to usurp the contract interpretation function of the arbitral tribunal. While reviewing a case arising under the NLRA, this Court observed:

> The function of the Court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which, on its face, is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.

United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 4 L. Ed. 2d 1403, 1406-07, 80 S. Ct. 1343 (1960).

While there is a strong federal labor policy favoring arbitration under the NLRA, there is an even stronger impetus favoring arbitration under the RLA. Under the NLRA, arbitration of disputes is not mandatory, but is a matter of contract between the parties. *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 8 L. Ed. 2d 462, 82 S. Ct. 1318 (1962). Arbitration under the RLA, however, is not optional. In the RLA, Congress fashioned an arbitration procedure which is "mandatory, exclusive, and comprehensive." *Brotherhood of Locomotive Engineers v. Louisville & National R.R.*, 373 U.S. 33, 10 L. Ed. 2d 172, 83 S. Ct. 1059 (1963). Pursuant to this statutory scheme, neither federal nor state courts have authority or jurisdiction to interpret RLA collective bargaining agreements. *Order of Ry. Conductors of Am. v. Pitney*, 326 U.S. 561, 90 L. Ed. 318, 66 S. Ct. 322 (1946).

Thirdly, if the Court were to adopt and use the standard suggested by Teamsters, the Court would be deciding the merits of the parties' dispute. For once the Court decided there was or was not "clear and unmistakable waiver", the controversy is at an end. "But under the RLA, it is not the role of the courts to decide the merits of the parties' dispute. Our role is limited to determining where the 'arguably justified' line is to be drawn." *Conrail* at 105 L. Ed. 2d 271.

Finally, if the Court were to adopt the suggested higher level of scrutiny when reviewing management rights clauses, the Court would be passing judgment upon the merit of the substantive terms of the parties' collective bargaining agreement. Under both the NLRA

and the RLA, there is a strong federal labor policy "against governmental interference with the substantive terms of collective bargaining agreements." *Chicago & Northwestern Ry. Co. v. United Transp. Union*, 402 U.S. 570, 29 L. Ed. 2d 187, 194, n. 11, 91 S. Ct. 1731 (1971); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615 (1937); *H.K. Porter Co., Inc. v. NLRB*, 379 U.S. 99, 25 L. Ed. 2d 146, 90 S. Ct. 821 (1970); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 96 L. Ed. 1027, 72 S. Ct. 824 (1952).

Significantly, in *Conrail*, this Court considered and rejected an argument similar to that being made by Teamsters in the case *sub judice*:

> . . . Collective bargaining agreements often incorporate express or implied terms that are designed to give management . . . a degree of freedom of action within a specified area of activity. . . . We have held under the National Labor Relations Act (NLRA), that no principle of labor law prohibits 'bargaining for . . . flexible treatment'. . . . We find no difference between the NLRA and the RLA in this respect. Yet the union would subject to especially strict scrutiny the bona fides of contractual claims arising out of contract terms that grant management the power to respond flexibly to changing circumstances. The effect of a selectively heightened level of scrutiny (a 'clear and patent' rather than an 'arguably justified' standard) would be to limit the enforceability of such contract terms, by requiring employers rigidly to maintain the status quo pending arbitration

> of their right to be flexible. That result is odd in itself . . . , and has unacceptable implications. To accept the . . . standard the union advocates would, in effect, be impermissibly to 'pass upon the desireability of the substantive terms of labor agreements,' . . . by affording flexible terms a less favored status.

105 L. Ed. 2d at 265.

In summary, contrary to Teamsters' argument, the *en banc* opinion of the Fifth Circuit is not in conflict with this Court's decision in *Conrail*. Indeed, quite to the contrary, the *en banc* opinion of the Fifth Circuit is consonant with this Court's decision in *Conrail* and is consonant with this Court's long-standing history of favoring arbitration of labor disputes.

II.

Teamsters argue that the *en banc* opinion of the Fifth Circuit is in conflict with the following decisions of other United States courts of appeals: *Transport Workers Union of Philadelphia v. Southeastern Pennsylvania Transp. Auth.*, 863 F.2d 1110 (3d Cir. 1988) (hereafter *"TWU v. SEPTA"*); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R. Co.*, 838 F.2d 1087 (9th Cir. 1988) (hereafter *"BLE v. Burlington Northern I"*); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R. Co.*, 838 F.2d 1102 (9th Cir. 1988) (hereafter *"BLE v. Burlington Northern II"*); and *Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R. Co.*, 802 F.2d 1016 (8th Cir. 1986) (hereafter *"BMWE v. Burlington Northern"*).

Preliminarily, it should be noted that all of these cases are factually distinguishable from the case *sub judice*. With only one exception to be discussed more fully below, *none* of these cases involved the question of whether express contract language arguably justified the proposed unilateral action.

A. *TWU v. SEPTA*. In this case, the Third Circuit initially affirmed the district court's conclusion that the unilateral implementation of random drug and alcohol testing differed sufficiently from prior practice to create a major dispute under the RLA. The employer had argued, *inter alia*, that it had reserved the right to modify unilaterally its drug testing procedures through a contractual clause which retained "all management functions and responsibilities which SEPTA has not expressly modified or restricted by a specific provision of this agreement." 863 F.2d at 1124. In the case *sub judice*, however, the language in question specifically reserves unto management a degree of freedom of action within a described area of activity, i.e., the express right unilaterally to promulgate new rules, regulations, and orders during the term of the contract. Consequently, *TWU v. SEPTA* is factually distinguishable from the case *sub judice*.

Dispositive of the Teamsters' argument, however, is the fact that *TWU v. SEPTA* was vacated and remanded by this Court on June 26, 1989. "The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of" . . . *Conrail*. 106 L. Ed. 2d 560. Moreover, on remand, in an opinion dated September 1, 1989, the Third Circuit concluded that the underlying dispute was a *minor* dispute under the RLA. 884 F.2d 709.

B. *BLE v. Burlington Northern I.* This case did not involve the question of whether *express* contract language authorized the proposed action. Rather, the employer had argued that since the contract was silent on the issue, enforcement of employee rules was "a matter entirely within its managerial prerogative." 838 F.2d at 1089-90. Unlike the case *sub judice*, there was no *express* contract language authorizing the employer to promulgate new rules, regulations, and orders during the term of the collective bargaining agreement.

The Ninth Circuit utilized a Fourth Amendment analysis in reaching its conclusion that the drug testing in question constituted a major dispute under the RLA. On June 26, 1989, this Court vacated and remanded the Ninth Circuit decision. "The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. ___, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989)" (rejecting Fourth Amendment rationale similar to Ninth Circuit analysis). 106 L. Ed. 2d 558.

C. *BLE v. Burlington Northern II.* Once again, this case is factually inapposite. It does not involve the question of whether *express* contract language arguably justified the proposed action. Rather, the employer argued that inasmuch as the contract was silent, it had impliedly retained the managerial prerogative to implement unilaterally the use of "sniffer dogs" for the detection of prohibited substances. Finding that there already existed an implied contrary agreement concerning the detection of controlled substances, the Ninth Circuit noted: "We express no

opinion as to whether measures such as those imposed by BN in this case could be justified as an exercise of managerial prerogative in the absence of an implied agreement." 838 F.2d at 1105, n. 5.

D. *BMWE v. Burlington Northern*. Teamsters egregiously misstate the holding in this case. More particularly, at page 7 of their petition, Teamsters cite the case in support of the proposition that numerous courts of appeals have found that changes in drug testing methodology constitute *major* disputes under the RLA. (Pet. 7.) Contrary to Teamsters' misstatement, *BMWE v. Burlington Northern* held that the changes in question constituted *minor* disputes. The employer had proposed to add drug testing to post-furlough physical examinations. Additionally, the employer sought to implement post-incident drug testing. The Eighth Circuit concluded that the two changes were both *minor* under the RLA.

In summary, all of these cited cases are factually distinguishable from the case *sub judice*. With one exception, none dealt with the issue of whether express contract language authorized the proposed unilateral action. In the one case dealing with an express management rights clause, *TWU v. SEPTA*, the clause was factually distinguishable from the language in the case *sub judice*. Moreover, and dispositive, this Court vacated and remanded the case for further consideration in light of *Conrail*. On remand, the Third Circuit concluded that the underlying dispute was *minor* under the RLA. Consequently, none of the foregoing cases provides a basis for conflict with the *en banc* opinion of the Fifth Circuit.

Conclusion

The *en banc* opinion of the Fifth Circuit is not in conflict with this Court's decision in *Conrail*. Further, the *en banc* opinion of the Fifth Circuit is not in conflict with a decision of another court of appeals. Consequently, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 89-1731

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA-AIRLINES DIVISION & LOCAL 19,
Plaintiffs-Appellants,

versus

SOUTHWEST AIRLINES COMPANY,
Defendant-Appellee.

U.S. COURT OF APPEALS

FILED

SEP 12 1989

GILBERT F. GANUCHEAU CLERK

Appeal from the United States Court of Appeals for the Northern District of Texas

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Before KING, HIGGINBOTHAM and SMITH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellant to consolidate this case with No. 87-1085 for the purpose of permitting appellant to seek a writ of certiorari before the United States Supreme Court is GRANTED

IT IS FURTHER ORDERED that appellant's motion to affirm the dismissal of the District Court in this case is GRANTED.